No. 83-507

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Petitioner,

v.

SHELTER FRAMING CORPORATION and G & R ROOFING COMPANY,

Respondents.

RESPONDENT G & R ROOFING COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the imposition of withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") against G & R Roofing Company, which withdrew from a multiemployer pension plan prior to MPPAA's enactment date of September 26, 1980 but subsequent to its retroactive effective date of April 29, 1980, violated G & R Roofing Company's constitutional rights as guaranteed by the due process clause of the fifth amendment to the Constitution of the United States.

2. Whether the district court and the court of appeals abused their discretion in awarding G & R Roofing Company attorneys' fees as the prevailing party in the litigation invalidating the MPPAA-based withdrawal liability claim asserted by Carpenters Pension Trust of Southern California, on the grounds of its unconstitutionality.

LIST OF PARTIES TO THE PROCEEDINGS

Carpenters Pension Trust for Southern California

Shelter Framing Corporation

G & R Roofing Company

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RESPONDENT G & R ROOFING COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent G & R Roofing Company ("G & R") respectfully requests that the petition for a writ of certiorari filed by Carpenters Pension Trust for Southern California ("CPT") be denied.

OPINIONS BELOW

The opinion of the court of appeals is reported at 705 F.2d 1502 (9th Cir. 1983) (App. Cert. at 1-27).[1] The order (App. Cert. 28) and amended order (App. A at 1a) denying CPT's petition for rehearing and suggestion for rehearing *en banc*, respectively filed on September 13 and October 4, 1983, are neither officially nor unofficially reported. The order denying the petition for rehearing and suggestion for rehearing *en banc* of PBGC with regard to its appeal from the denial of its motion to intervene in the district court (App. B at 2a-3a) is neither officially nor unofficially reported.

The opinion of the district court (App. Cert. at 29-70) granting G & R's motion for summary judgment is reported at 543 F.Supp. 1234 (C.D. Cal. 1982). The district court's summary judgment (App. C at 4a-8a) is unofficially reported at 3 E.B.C. (BNA) 1281 (C.D. Cal. April 13, 1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent statutory and constitutional provisions are set forth in CPT's petition (Petition at 2, App. Cert. at 71-84). The fifth amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of

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[1] "App. Cert." refers to portions of the appendices to the petition for writ of certiorari. Appendix A ("App. A") refers to the amended order of the court of appeals denying CPT's petition for rehearing and suggestion for rehearing *en banc*. Appendix B ("App. B") refers to the order of the court of appeals denying the petition for rehearing and suggestion for rehearing *en banc* of Pension Benefit Guaranty Corporation ("PBGC"). Appendix C ("App. C") refers to the summary judgment of the district court. App. A, App. B, and App. C are attached as appendices to this brief in opposition, pursuant to Sup.Ct.R. 21(k) and 22.2. ("Petition") refers to CPT's Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

This is a declaratory judgment action filed by G & R challenging the imposition of withdrawal liability pursuant to the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 94 Stat. 1208 (1980), 29 U.S.C. § 1381, *et seq.* (Supp. V 1981). MPPAA amends the Employee Retirement Income Security Act of 1974 ("ERISA"), 88 Stat. 829 (1974), 29 U.S.C. § 1001, *et seq.* (1976).[2] CPT filed a counterclaim seeking to recover the withdrawal liability it assessed in the amount of $687,387.

G & R asserted numerous challenges to the constitutionality of MPPAA, including:

1. Whether MPPAA can be applied consistent with the due process requirements of the fifth amendment to an employer who withdrew from a multiemployer pension plan well prior to the statute's enactment on September 29, 1980?

2. Whether MPPAA violates due process requirements of the fifth amendment in its retroactive effect when it abrogates contractual limitations upon the liability of an employer to a multiemployer pension plan which were lawful and enforceable when entered into?

3. Whether MPPAA violates the fifth amendment's guarantee that private property will not be taken for a public purpose without just compensation?

4. Whether an employer who is required to make withdrawal liability payments to a multiemployer pension plan under the compulsion of MPPAA, prior to receiving

[2] "MPPAA §" refers to sections of ERISA as amended by MPPAA. "ERISA §" refers to provisions of ERISA prior to the passage of MPPAA.

a meaningful hearing before a judicial officer with the discretion to deny the claim, is deprived of procedural due process under the fifth amendment?

5. Whether MPPAA violates the fifth amendment's guarantee of a right to hearing before an impartial and detached tribunal in the first instance?

6. Whether MPPAA violates the due process clause of the fifth amendment by designating that legal and factual conclusions reached by the trustees of a multiemployer pension plan in reviewing their own assessment of withdrawal liability are presumed to be correct unless they are shown to be unreasonable or clearly erroneous?

7. Whether MPPAA, which requires that factual questions concerning the accuracy of the assessment of withdrawal liability be determined in compelled arbitration without the benefit of a trial by jury, violates the seventh amendment?

8. Whether MPPAA, which requires that disputes over the assessment of withdrawal liability be submitted to compelled arbitration with limited review by the courts deprives a withdrawn employer of access to an Article III court?

The district court ruled that MPPAA violates the due process clause of the fifth amendment to the extent that it allows for the imposition and collection of withdrawal liability against employers who withdrew from multiemployer pension plans prior to the statute's enactment date of September 26, 1980. *Shelter Framing Corp. v. Carpenters Pension Trust for Southern California*, 543 F.Supp. 1234, 1248-54 (C.D. Cal. 1982), *aff'd*, 705 F.2d 1502 (9th Cir. 1983) (App. Cert. 56-69). The district court rendered no decision with regard to G & R's constitutional challenges that: (1) its property would be taken without just compensation in violation of the taking clause of the fifth amendment, or (2) MPPAA's retroactive effect abrogated enforceable contractual limitations upon liability to a multiemployer pension plan in violation of the due process clause of the fifth amendment. *Id.* at 1254; 3 E.B.C. (BNA) at 1283 (App. Cert. at 69-70; App. C at 5a-6a).

The district court ruled that MPPAA did not unconstitutionally deny withdrawn employers of procedural due process, of access to an Article III court or to a right to a jury trial under the seventh amendment. *Id.* at 1243-48 (App. Cert. at 45-56). The district court also awarded G & R attorneys' fees pursuant to MPPAA §§ 4301(a)(1) and (e), 29 U.S.C. §§ 1451(a)(1) and (e) (Supp. V 1981) (App. Cert. at 80-81) 3 E.B.C. (BNA) at 1283-84 (App. C at 6a-8a).

The Ninth Circuit affirmed the district court's ruling that MPPAA could not be applied to employers who withdrew prior to the statute's enactment date consistent with the due process requirements of the fifth amendment. 705 F.2d at 1509-15 (App. Cert. at 14-25). The Ninth Circuit agreed with the district court that MPPAA § 4301(e) authorized an award of attorneys' fees to employers successfully challenging the constitutionality of withdrawal liability assessments, and found that the court had not abused its discretion in awarding attorneys' fees to G & R. *Id.* at 1515 (App. Cert. at 26-27). The court of appeals also granted G & R attorneys' fees on appeal pursuant to MPPAA § 4301(e). *Id.* The Ninth Circuit considered none of the other grounds advanced by G & R with regard to the constitutional deficiency of MPPAA. *Id.*

The material facts underlying G & R's constitutional challenge are undisputed. From October, 1972 through July 1, 1980, G & R was bound to a collective bargaining agreement with the United Brotherhood of Carpenters and Joiners of America ("union"), which required contributions to CPT at a specified rate for each hour worked by its employees. CPT was formed in 1959 pursuant to a trust agreement entered into between the union and several multiemployer associations. G & R has never been a member of any of those multiemployer associations. G & R steadfastly abided by its collective bargaining agreement with the union and made all contractually required contributions to CPT.

At the time G & R entered into its collective bargaining relationship with the union, neither ERISA nor MPPAA was in effect. G & R was free to withdraw its participation in CPT so long as it gave timely notice to terminate in accordance with the terms of the appropriate collective bargaining agreement and satisfied its bargaining obligation under the National Labor Relations Act § 8(a)(5), 29 U.S.C. § 158 (a)(5) (1976), as amended.

ERISA was passed in 1974. Under ERISA, a termination insurance program was established to be administered by PBGC. Under that plan, certain benefits were to be guaranteed by PBGC if the assets of the

terminated plan were insufficient to fully fund those benefits. *See* ERISA § 4022, 29 U.S.C. § 1322 (1976). An employer was free to withdraw from a pension plan without incurring any continuing obligation to that plan so long as the plan did not terminate within five years subsequent to withdrawal. Even then, a withdrawn employer was only required to reimburse PBGC for amounts it had to pay under the benefit guaranty provisions of ERISA. These guaranteed amounts did not necessarily reach the full extent of the pension promises made by the pension plan. A withdrawn employer's liability was further limited to thirty percent of its net worth.

ERISA had no retroactive application. The major provisions of the new law took effect on September 2, 1974, its enactment date. Although ERISA was concerned chiefly with protecting the employees' pension expectations, it also realized that employers could not create, maintain, or expand pension plans if the costs imposed by ERISA were too high. Thus, ERISA contained many provisions which were designed to ameliorate hardship to employers which included:

(1) A ceiling on an employer's liability at thirty percent of its net worth, ERISA § 4062(b)(2), 29 U.S.C. § 1362(b)(2) (1976);

(2) A limitation on the amount of benefits which PBGC could guarantee, ERISA § 4022(b)(3), 29 U.S.C. § 1322(b)(3) (1976);

(3) A phase-in of the amount of benefits to be guaranteed from plan amendments, ERISA § 4022 (b)(8), 29 U.S.C. § 1322(b)(8) (1976);

(4) An authorizatoin to PBGC to offer insurance to employers against contingent withdrawal liability with low insurance premiums, ERISA §§ 4006 and 4023(a), 29 U.S.C. §§ 1306 and 1323(a) (1976); and

(5) A grant of authority to PBGC to waive or reduce the liability imposed under the termination insurance provisions of ERISA during the first nine months after ERISA's effective date to avoid unreasonable business hardship "in any case in which the employer was not

> able, as a practical matter, to continue the plan," ERISA § 4004(f), 29 U.S.C. § 1304(f) (1976).

Mandatory ERISA insurance coverage did not apply to multiemployer pension plans until August 1, 1980. Pub.L.No. 96-293, 94 Stat. 610 (June 30, 1980).

After ERISA's passage, the trust agreement establishing CPT was revised. The trust agreement, in pertinent part, guaranteed employers that they would not be liable or responsible for any debts, liabilities or obligations of CPT or its trustees, and it expressly limited the employer's financial obligation:

> [T]o the payments required by the collective bargaining agreement with respect to his or its individual or joint venture operation, and . . . Individual Employers shall not be required to make any further payments or Contributions to the cost or operation of the fund or the pension plan except as may hereinafter be provided in the Collective Bargaining Agreements.

The last collective bargaining agreement to which G & R was signatory expired July 1, 1980. That agreement required that notice to terminate had to be given at least sixty days prior to June 15, 1980, but no later than April 15, 1980. G & R was not free to withdraw its participation in CPT for hours worked by its carpenter employees until at least July 1, 1980, when the agreement expired. Like the trust agreement, the collective bargaining agreement provided:

> The parties recognize and agree that the Pension Trust was created, negotiated and shall continue to be a defined contribution plan and trust and that the individual Contractor's liability with regard to pensions has been and remains limited exclusively to payment of the contributions specified from time to time in collective bargaining agreements.

Pension benefit levels are determined solely by the trustees of CPT. At no material time has any shareholder, officer, director, agent or representative of G & R participated in: (a) investment decisions pertaining to any assets of CPT; (b) decisions of CPT to raise pension benefit levels; (c) decisions affecting CPT's administrative costs; or (d) the selection of actuarial assumptions or methods or accounting principles or

methods with which G & R's asserted withdrawal liability has been calculated. As a matter of law, the CPT trustees' sole obligation is to the beneficiaries of the pension fund and that obligation is a fiduciary one. *See NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981).

On or about April 8, 1980, G & R sent the union a notice to terminate its collective bargaining agreement. G & R's agreement expired effective July 1, 1980. After an impasse in negotiations was reached on July 18, 1980, G & R ceased having an obligation to contribute to CPT.

At that time, Congress was in a state of confusion about the legislative bill which became MPPAA. As late as August, 1980, after G & R had withdrawn, one Senator lamented: "There are few, if any, members of the House or Senate who can confidently state how this bill will operate." 126 Cong.Rec. S10520 (daily ed. August 1, 1980) (statements of Sen. Durenberger); *see also* 126 Cong.Rec. S10167 (daily ed. July 29, 1980) (statements of Sen. Armstrong).

If MPPAA had been in effect at the date of its withdrawal, G & R would have exercised several options which would have avoided or substantially reduced its withdrawal liability exposure. Those alternatives included selling its business or going out of business entirely.

MPPAA was enacted on September 26, 1980. The withdrawal liability provisions of MPPAA were made retroactive to withdrawals which occurred on or after April 29, 1980. MPPAA § 4402(e)(2)(A), 29 U.S.C. § 1461(e)(2)(A) (Supp. V 1981) (App. Cert. at 84). When originally introduced in February, 1979, the bill which became MPPAA was to have had an effective date of February 27, 1979. The effective date of the withdrawal liability provisions was delayed solely in response to strong political pressures exerted by certain employers who were caught by the earlier date. Congress recognized that permitting those employeres to avoid withdrawal liability served to increase the burden placed upon remaining employers. 126 Cong.Rec. S10101, 10157 (daily ed. July 29, 1980) (statements by Sen. Javits and Sen. Matsunaga).

On or about September 2, 1981, CPT notified G & R of the amount of its withdrawal liabilty assessment and demanded payment in accordance with a prescribed schedule. The total amount of G & R's withdrawal liability assessment is $687,387, which purportedly represents G & R's proportionate share of CPT's claimed unfunded vested liability as of December 31, 1979 in the amount of $282,854,000. The withdrawal

liability claim asserted against G & R is not based upon any claimed breach of a collective bargaining agreement. It is not based upon any need for payment of benefits to any particular present or former employee of G & R. The unfunded vested benefit liability has not been generated because of the retirement of any former or current employee of G & R.

If CPT's claim were paid outright, MPPAA will have appropriated forty percent of G & R's net worth. If G & R elected to pay monthly installments of $17,397.83 as computed pursuant to MPPAA § 4219(c)(1)(C), 29 U.S.c. § 1399(C)(1)(C) (Supp. V 1981) (App. Cert. at 73-74), MPPAA will have consumed ninety-four percent of G & R's net income for its fiscal year 1981.

Conversely, G & R's withdrawal liability assessment amounts to .00243 of CPT's claimed unfunded vested liability. CPT is in no danger of insolvency.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

1. With Regard To The Retroactive Imposition Of Withdrawal Liability Against Employers Who Withdrew Prior To MPPAA's Enactment Date, CPT Has Failed To Demonstrate A Direct Conflict In Decisions Between The Ninth Circuit And Another Federal Court Of Appeals.

Sup.Ct.R. 17 sets forth the general considerations governing the standards for review on writ of certiorari. CPT asserts two grounds which it contends warrants the exercise of this Court's discretion to review the Ninth Circuit's decision. Those grounds are: (1) the Ninth Circuit's decision is in direct conflict with the decision of the United States Court of Appeals for the Fourth Circuit in *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, ____ F.2d ____, Nos. 83-1054, 83-1109, 83-1119, and 83-1196 (4th Cir. September 9, 1983), and other federal district courts (Petition at 9-10); and (2) further guidance from this Court is needed with regard to the meaning and application of prior decisions of this Court regarding the constitutionality of retroactive legislation (Petition at 10-19). Neither ground asserted is sufficiently substantial to warrant the exercise of this Court's discretionary jurisdiction.

Although the United States Court of Appeals for the Fourth Circuit held in *Republic Industries, Inc.* that MPPAA, as applied retroactively, did not violate a withdrawn employer's fifth amendment due process rights, that decision does not present a true conflict. In *Republic Industries, Inc.*, the withdrawal liability assessed relates to the closing of a terminal which the company contends occurred prior to MPPAA's effective date of April 29, 1980. *Republic Industries, Inc., slip op.* at 7-9. Under MPPAA § 4217(a)(2), 29 U.S.C. § 1397(a)(2) (Supp. V 1981), a "facility" at which all covered operations permanently ceased before April 29, 1980, or for which there was a permanent cessation of the obligation to contribute to a multiemployer pension plan before that date, is not taken into effect in assessing complete or partial withdrawal liability. *Republic Industries, Inc.* thus has a complete statutory defense to the imposition of withdrawal liability. Under the cardinal principle that courts should not pass upon questions of constitutionality where statutory grounds might be dispositive, the Fourth Circuit should not have considered the challenge to the retroactive application of MPPAA prior to resolving the statutory claim. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 582 (1979).

CPT further argues that there is conflict between the Ninth Circuit's decision and the decision of other federal district courts. Generally, a conflict between decisions of a federal court of appeals and of a federal district court is not grounds for this Court's exercise of its discretion to grant a petition for a writ of certiorari. Of the district court decisions referred to by CPT as conflicting with the Ninth Circuit's decision (Petition at 9-10), there is only a true direct conflict between the Ninth Circuit's decision and the decision of one district court; *i.e., Textile Workers Pension Fund v. Standard Dye & Finishing Co., Inc.*, 549 F.Supp. 404 (S.D. N.Y. 1982). *But see also Coronet Dodge, Inc. v. Speckman*, 553 F.Supp. 518 (E.D. Mo. 1982). Although the court in *Peick v. Pension Benefit Guaranty Corp.*, 539 F.Supp. 1025 (N.D. Ill. 1982), *appeal pending*, No. 82-2081 (7th Cir. filed July 7, 1982), did rule that MPPAA as applied to employers who withdrew prior to its enactment date was constitutional, the court in *Peick* stated that it did not disagree with the conclusion of the *Shelter Framing* district court. 539 F.Supp. at 1056 n. 79; *see also Shelter Framing Corp.*, 543 F.Supp. at 1254 n. 7 (App. Cert. at 69). In *Peick*, the withdrawn employers had not been billed for withdrawal liability, and thus the court was faced with a facial and vacuous debate as to MPPAA's constitutionality.

The other district court decisions referred to by CPT (Petition at 9-10), do not present adequate grounds for granting of the petition. One decision referred to is the district court's decision in *R.A. Gray & Co. v. Oregon-Washington Carpenters-Employers Pension Trust Fund*, 549 F.Supp. 531 (D. Ore. 1982) *rev'd sub nom. Shelter Framing Corp. v. Carpenters Pension Trust for Southern California*, 705 F.2d 1502 (9th Cir. 1983), which was consolidated for disposition by the Ninth Circuit in this case. *Shelter Framing Corp.*, 705 F.2d at 1505 n. 3 (App. Cert. at 4).[3] The remaining case referred to in CPT's petition is *Pacific Iron & Metal Co. v. Western Conference of Teamsters Pension Trust Fund*, 553 F.Supp. 523 (W.D. Wash. 1982), which is within the Ninth Circuit. It is the duty of the Ninth Circuit, not the obligation of this Court, to maintain uniformity within its jurisdiction and to supervise the decisions of the various district courts.

2. The Ninth Circuit Decided Correctly That MPPAA Could Not Be Constitutionally Applied To Employers Who Withdrew From Multiemployer Pension Plans Prior To The Statute's Enactment Date.

In ruling that MPPAA was unconstitutional as applied to employers who withdrew prior to the statute's enactment date of September 26, 1980, the Ninth Circuit employed the four-factor analysis articulated in *Nachman v. Pension Benefit Guaranty Corporation*, 592 F.2d 947 (7th Cir. 1979), *aff'd on statutory grounds only*, 446 U.S. 359 (1980). *Shelter Framing Corp.*, 705 F.2d at 1510-11 (App. Cert. at 10-11). The *Nachman* court considered the constitutionality of ERISA, which had no retroactive effective date.

While G & R is not conceding that the *Nachman* test is appropriate when applied to retroactive civil, economic legislation, the Ninth Circuit's decision is consistent with prior precedent of this Court in *Railroad Retirement Board v. Alton Railroad*, 295 U.S. 330 (1935), and *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). In both cases, this Court invalidated legislation having retroactive effects upon

[3] The Ninth Circuit's decision as it pertains to *R.A. Gray & Co.* has been appealed to this Court. *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, Nos. 83-245 and 83-291 (U.S. filed Aug. 15, 1983).

the funding of and entitlement to pension benefits.[4] The Court in *Alton* condemned unanimously provisions of the Railroad Retirement Act of 1934 which required the payment of pensions to employees whose employment had ended prior to the statute's enactment. 295 U.S. at 348-50, 389 (Hughes, C.J., dissenting). The Court's *Alton* decision has not been overruled. *See Usery v. Turner Elkorn Mining Co.*, 428 U.S. 1, 19 (1976). This Court has expressly recognized that retroactive legislation will not be paid the same deference as prospective legislation. *Id.* at 16-17.

In upholding the retroactive application of MPPAA, the courts have relied heavily upon a withdrawn employer's asserted obligation to anticipate the outcome of pending legislation. *Republic Industries, Inc., slip op.* at 21-22; *Peick*, 539 F.Supp. at 1052-53; *Pacific Iron & Metal Co.*, 553 F.Supp. at 527; *Textile Workers Pension Fund*, 549 F.Supp. at 408-09 & n. 8. These cases are in direct conflict with this Court's emphatic statement in *Untermeyer v. Anderson*, 276 U.S. 440, 445-46 (1928): "The taxpayer may justly demand to know when and how he becomes liable for taxes -- he cannot foresee and ought not to be required to guess the outcome of pending measures. The future of every bill while before Congress is necessarily uncertain. The will of the lawmakers is not definitely expressed until final action thereon has been taken." *Accord, Shelter Framing Corp.*, 705 F.2d at 1511 (App. Cert. at 17-18). A withdrawn employer, like a taxpayer, is not required to anticipate the outcome of pending legislation and is entitled to act based upon the law in effect at the time the act occurs. MPPAA cannot constitutionally reach back and impose withdrawal liability on employers who withdrew prior to the statute's enactment date, particularly in the absence of any provisions moderating the statute's impact. *Shelter Framing Corp.*, 705 F.2d at 1514-15 (App. Cert. at 24-25).

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[4] Although *Spannaus* dealt with the application of the contracts clause, U.S. const. art. I, § 10, cl. 1, it has been recognized that the due process clause imposes comparative restraints on federal legislation. *See Spannaus*, 438 U.S. at 241 & n. 12; *Veix v. Sixth Ward Bldg. & Loan Ass'n of Newark*, 310 U.S. 32, 41 (1940); *Nachman Corp. v. Pension Benefit Guar. Corp.*, 592 F.2d at 959; Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv.L.Rev. 692, 695 (1960); Hale, *The Supreme Court and the Contracts Clause: III*, 57 Harv.L.Rev. 852, 890-91 (1944).

3. The Ninth Circuit's And The District Court's Awards Of Attorneys' Fees To G & R Do Not Warrant Review By This Court.

CPT has shown no basis for this Court to exercise its discretion to review the ruling of the Ninth Circuit and the district court in granting G & R attorneys' fees pursuant to MPPAA § 4301(e). G & R was a prevailing party both as to its declaratory judgment action challenging the constitutionality of MPPAA and with regard to CPT's counterclaim to collect the withdrawal liability assessed. *Shelter Framing Corp.*, 543 F.Supp. at 1254-55 (App. Cert. at 69-70). MPPAA § 4301(e) provides for an award of attorneys' fees in the discretion of the court to an employer who is adversely affected by an act or omission of another party with respect to a multiemployer plan. The courts of appeals which have considered this issue with regard to the constitutionality of MPPAA are in agreement that Section 4301 applies to constitutional challenges against the assessment of withdrawal liability. *Republic Industries, Inc., slip op.* at 37-38; *Shelter Framing Corp.*, 705 F.2d at 1515 (App. Cert. at 26-27).

Inasmuch as an award of attorneys' fees under Section 4301(e) is committed to the discretion of the district court and the court of appeals, the standard of review is abuse of discretion. *Id.* An abuse of discretion is found only when there is a definite conviction that the court made a clear error of judgment in its conclusion upon weighing relevant factors. *Cf. Hummel v. S.E. Rykoff & Co.*, 634 F.2d 446 (9th Cir. 1980) (concerning the awardability of attorneys' fees under ERISA § 502(g), 29 U.S.C. § 1132(g) (1976), which allows an award of such fees to the prevailing party). The Ninth Circuit applied the *Hummel* standard and determined that the district court had not abused its discretion in awarding attorneys' fees to G & R under MPPAA § 4301(e). The appellate court made an independent award of attorneys' fees to G & R with respect to the appellate proceedings. 705 F.2d at 1515 (Supp. App. at 26).

CPT is asking this Court to reweigh the facts which were found in favor of G & R by both the district court and the Ninth Circuit. This Court has often stated that "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Manufacturing Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

The gravamen of CPT's disagreement with the ruling of the Ninth Circuit is that it is not good policy to award attorneys' fees against a trust fund which unsuccessfully attempts to collect withdrawal liability because the attorneys' fees awarded will be paid from the fund created to provide pensions. CPT's complaint is more appropriately addressed to Congress than to this Court which, absent constitutional impediments, does not sit to reassess the relative wisdom of legislative policy. *E.g.*, *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955); *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152-54 (1938).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MERRILL AND SCHULTZ,
A Law Corporation

By: Michael E. Merrill and
Mark T. Bennett

APPENDICES

APPENDIX A

FILED

UNITED STATES COURT OF APPEALS OCT 04 1983

FOR THE NINTH CIRCUIT

SHELTER FRAMING CORPORATION, Plaintiff/Appellee, v. CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA, Defendant/Appellant.	No. 82-5460
G & R ROOFING COMPANY, Plaintiff/Appellee, v. CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA, Defendant/Appellant.	No. 82-5461 **ORDER** (Amended)

Before: WRIGHT, KENNEDY and BOOCHEVER, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing of appellant Carpenters Pension Trust for Southern California, and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc hearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHELTER FRAMING CORPORATION,

Plaintiff/Appellee,

and

CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Defendant/Appellee,

v.

PENSION BENEFIT GUARANTY CORPORATION,

Applicant for Intervention/
Appellant.

No. 82-5271

G & R ROOFING COMPANY, a California corporation,

Plaintiff/Appellee,

and

CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Defendant/Appellee,

v.

PENSION BENEFIT GUARANTY CORPORATION,

Applicant for Intervention/
Appellant.

No. 82-5272

ORDER

Before: WRIGHT, KENNEDY and BOOCHEVER, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing of appellant Pension Benefit Guaranty Corporation and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

No. 82-5460, 82-5461

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & R ROOFING COMPANY, Plaintiff, v. CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA, Defendant.	NO. CV 81-5551-IH **SUMMARY JUDGMENT**

There came before the Court for hearing on March 22, 1982, mutual motions for summary judgment as to all issues affecting the constitutionality of the Multiemployer Pension Plan Amendment Act ("MPPAA"), 29 U.S.C. Sec. 1301 ff. Appearances were: for Plaintiff G & R Roofing, Merrill, Schultz & Hersh by Michael E. Merrill, Esq., Stephen Schultz, Esq., and Mark Bennett, Esq.; for Defendant Carpenters Pension Trust, Cox, Castle & Nicholson by James P. Watson, Esq., and Howard Kroll, Esq.; and Pension Benefit Guaranty Corporation by Peter Gould, *amicus curiae*.

Both motions were filed under date of February 17, 1982. The evidence filed in support of each motion and in opposition to each is summarized in the transcript of the proceedings in open court on March 22, 23 and 24, 1982, filed herein.

Counsel for both sides agreed in open court that the matter was ripe for summary judgment, that there were no bona fide disputes of material fact and that the issues presented by the motions of the parties involved only questions of law.

It is clear from the scope of the said motions that if a summary judgment is awarded to Plaintiff, the same will be a final judgment in the case and that such a judgment in favor of Plaintiff will necessarily involve the entry of a judgment against Defendant on Defendant's counterclaim. It is likewise clear that if Plaintiff's summary judgment motion is denied, said judgment would not be a final judgment in the case and would settle

only issues of law, and further trial would be required on Defendant's counterclaim.

The Court heard argument on the said mutual summary judgment motions on March 22, 23 and 24, 1982, inclusive. On March 23, 1982, the Court announced from the bench that Plaintiff's motion for summary judgment would be denied insofar as it sought a declaration of unconstitutionality on the grounds of denial of equal protection, vagueness, taking of property without a hearing, denial of right to jury trial, denial of access to the courts, and denial of an impartial tribunal. On March 24th, the Court announced from the bench that Plaintiff's motion would be granted and the statute held unconstitutional as applied to this Plaintiff on the ground that retroactive application of MPPAA to an employer who withdrew from a regulated plan prior to the statute's enactment date of September 26, 1980, violates due process.

In announcing the aforesaid decisions as its intended decisions, the Court took note of the fact that an emergency order of the Court of Appeals, issued March 22, 1982, enjoined the Court from entering any judgment in the case pending further order of the Court of Appeals. The Court is now informed that said emergency order is no longer in effect and thus deems it appropriate and proper to enter this judgment.

The transcript of proceedings in open court on March 22, March 23 and March 24, which are filed in the Court's files herein, shall constitute the Court's findings of fact and conclusions of law as well as an explanation for the reasons underlying the Court's judgment.

The Court having heard argument from the parties and *amicus curiae*, and having considered the aforesaid mutual summary judgment motions and the various Points and Authorities and evidentiary and other documents filed in support thereof and in opposition thereto, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Plaintiff G & R Roofing Company shall have judgment against Defendant Carpenters Pension Trust for Southern California with costs of $_____. Defendant Carpenters Pension Trust for Southern California shall take nothing by its counterclaim against Plaintiff. MPPAA is declared unconstitutional and void as violating the due process clause as applied to Plaintiff because of its retroactive application to the Plaintiff which lawfully terminated its participation in the pension

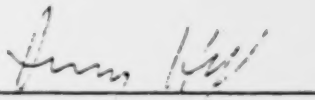
plan administered by Defendant prior to September 26, 1980, the enactment date of MPPAA.

2. The Court makes no holding as to the Plaintiff's challenge to MPPAA's constitutionality on the ground of an illegal taking of property without just compensation.

3. As to awardability of attorneys fees to Plaintiff (which issue was briefed by the parties following March 24, 1982, and submitted for decision without a hearing), the Court holds that Plaintiff shall be awarded attorneys fees pursuant to 29 U.S.C. Sec. 1451(a)(1) and 1451(e). Said award shall be fixed when the instant judgment becomes final, the Court reserving jurisdiction to fix the same at that time. See the Court's letter to counsel of April 6, 1982, a copy of which is attached hereto.

4. The Clerk shall transmit a copy of this Judgment by United States mail to counsel for the parties and *amicus curiae*.

DATED: April 12, 1982.



IRVING HILL, Judge
United States District Court

UNITED STATES DISTRICT COURT
Central District of California
312 North Spring Street
Los Angeles, California 90012

April 6, 1982

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Re: G & R Roofing v. Carpenters Pension Trust
No. CV 81-5551-IH
Shelter Framing v. Carpenters Pension Trust
No. CV 81-4457-IH

Dear Counsel:

On the question of awarding attorneys fees to the prevailing party, I have considered the Points and Authorities submitted by both Plaintiffs and by the Defendant. PBGC submitted no written Points and Authorities although it did announce a position in open court.

If and when I am free to enter a judgment in these cases, it will contain a provision which states that attorneys fees will be awarded to the prevailing party when the judgment becomes final. It will further state that no award is made at this time, the Court reserving jurisdiction to make the award when the judgment becomes final. It will further state that before making an award, the Court will again give the parties an opportunity to be heard as to the amount of the award and the factors which should be considered by the Court in fixing the amount. At that later time, the Court will take evidence on the extent, nature and value of the services.

This letter advises you then of the following conclusions I have reached:

1. The Court has discretion to award attorneys fees to the prevailing party. Both sides appear to agree on this. The discretion arises from the sections of ERISA which I mentioned at our last hearing. In my view, there is no discretion which derives from 29 U.S.C. Sec. 1132(g).

2. Discretion to award fees will be exercised in this case. There is nothing about the nature of the case that would inhibit or prevent the Court from exercising its discretion in favor of awarding fees to the prevailing party.

It follows from what I have said above that the Court is not necessarily bound, when it makes the final award, to award an amount equal to the fair value of the services or measured in accordance with any multiplier. Many of the factors urged upon the Court by counsel in the papers will have to be considered and weighed.

Yours very truly,

Irving Hill

Judge Irving Hill